# Chapter 2

# Consular and Judicial Assistance and Related Issues

## A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

### 1. *Request for Interpretation of the Judgment in the Case Concerning Avena and Other Mexican Nationals*

On January 19, 2009, the International Court of Justice ("ICJ") or ("Court") issued a judgment in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, available at *www.icj-cij.org/docket/files/139/14939.pdf*. *See Digest 2008* for discussion of Mexico's June 5, 2008 request; for background on the Court's judgment in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 21 ("*Avena*"), see *Digest 2003* at 43–103 and *Digest 2004* at 37–43. In its 2009 judgment, the Court found, among other things, no interpretive dispute between Mexico and the United States concerning the *Avena* judgment under Article 60 of the Court's Statute. The Court's judgment also included a provision reaffirming the binding nature of the U.S. obligations under paragraph 153(9) of the *Avena* judgment. For written submissions and oral proceedings in the case, see *www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=0*.

### 2. Private Right of Action for Money Damages or Other Relief

On August 14, 2009, by order of the U.S. Court of Appeals for the Third Circuit, the United States filed a brief as *amicus curiae* in support of a district court judgment dismissing a Jamaican national's claims under the Vienna Convention on Consular Relations, 42 U.S.C. §§ 1983 and 1985,[*]

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[*] Editor's note: 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

and the Alien Tort Claims Act, 28 U.S.C. § 1350. *McPherson v. United States*, Case No. 08-3757 (3d Cir.). The complaint sought damages against the United States, two states and counties within the United States, and five law enforcement officials for alleged violations of Article 36 of the Vienna Convention, among other things, but the plaintiff did not appeal the dismissal of his claims against the United States.

In its brief, excerpted below, the United States set forth the view that "the district court correctly dismissed the plaintiff's claims here because the Vienna Convention does not create judicially enforceable individual rights to consular notification and access. Furthermore, even if the Convention did create enforceable rights to consular notification and access, there would be no legal basis for a private suit for money damages for their violation." (Some footnotes are omitted.) Chapter 4.C.2. discusses when a treaty may be found to create judicially enforceable rights. In response to the court's questions, the U.S. brief also expressed the view that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not bar a suit for damages for violation of consular notification and access requirements and that the district court properly dismissed the complaint *sua sponte* on statute-of-limitations grounds. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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**I. THE VIENNA CONVENTION DOES NOT CREATE RIGHTS TO CONSULAR NOTIFICATION AND ACCESS THAT MAY BE VINDICATED IN A PRIVATE ACTION FOR MONEY DAMAGES.**

**A. Article 36 Does Not Confer Any Private Right To Sue To Remedy A Violation Of Consular Notification Requirements.**

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. . . The [Vienna] Convention's text, structure, and history give no indication that Article 36 was intended to create individually enforceable rights.

2. In the context of a federal statute, the statutory text ordinarily "must be phrased in terms of the persons benefitted" before the statute will be found to create private rights that may in turn give rise to a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Viewed through that lens, the Vienna Convention cannot be read to provide private rights subject to individual enforcement in court. The text of the Convention explicitly "disclaims any intent to create individual rights." *United States v. Duarte-Acero*, 296 F.3d 1277, 1281–1282 (11th Cir. 2002). The Preamble recognizes that the Convention's purpose is "*not to benefit individuals* but to ensure the efficient performance of functions by consular posts." Although this specific limitation refers to "privileges and immunities," it reflects the broader point that the entire treaty, including Article 36, is intended to enhance States' ability to protect their nationals abroad rather than to

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42 U.S.C. § 1985 provides civil remedies for conspiracy to interfere with an individual's civil rights.

create freestanding individual rights. *See, e.g., Mora* [*v. People of the State of New York*], 524 F.3d [183,] 196–197 [2d Cir. (2008), *cert. denied*, 129 S. Ct. 397 (2008)].

Furthermore, while Article 36 uses the term "rights" to refer to a detained foreign national's ability to request that his consulate be notified of his arrest and to have communications forwarded to the consulate, the article "says nothing about the nature of" those rights "or how, if at all, they may be invoked." *Cornejo* [*v. County of San Diego*], 504 F.3d [853,] 859 [9th Cir. (2008)]. Furthermore, the requirement at issue in this case—"a receiving State's obligation to inform a detained foreign national of his 'rights' under paragraph 1(b)—is never itself expressly referred to as a 'right.'" *Mora*, 524 F.3d at 194 . . . . In any event, "the text of the Convention is entirely silent as to whether private individuals can seek redress for violations of this obligation—or any other obligation set forth in Article 36—in the domestic courts of States-parties." *Mora*, 524 F.3d at 194.

Significantly, the first protection extended under Article 36 is to consular officials, who "shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of detained foreign nationals were deliberately placed underneath, *see* 1 Official Records, United Nations Conf. on Consular Relations, Vienna, 4 Mar.–22 Apr. (1963), 333 (Chile), signaling what Article 36's introductory clause spells out—that the Article's function is not to create freestanding individual rights, but "to facilitat[e] the exercise of consular functions." *See Mora*, 524 F.3d at 196; *Cornejo*, 504 F.3d at 859–60. As a practical matter, a foreign national's rights are necessarily subordinate to his country's rights, since it is entirely up to a consulate whether to respond to its national's request for assistance. Given that neither a foreign State nor its consular official can sue under the Convention or 42 U.S.C. § 1983 to remedy an alleged violation, *see Breard v. Greene*, 523 U.S. 371, 378 (1998), it follows that an individual alien should not be able to do so either.

Article 36 also provides that consular access rights "shall be exercised in conformity with [domestic law], subject to the proviso *** that [domestic law] must enable full effect to be given to the purposes for which the rights *** are intended." The reference to how rights "shall be *exercised*" speaks to how rights will be implemented in practice, *i.e.*, how detainees will be told of the right to contact consular officials, how consular officers will be contacted, and how consular officers will be given access to a detainee. That is quite different from the available *remedies* for a violation. *See Cornejo*, 504 F.3d at 861. For example, when a person seeks damages from an official who has violated his Fourth Amendment rights, he is not exercising those rights in bringing the lawsuit; he is suing to remedy a prior interference with the exercise of those rights. Notably, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), held that the "full effect" provision did not prevent a finding of procedural default, and also expressed "doubt" that there must be a "judicial remedy" for a violation of Article 36, noting that "diplomatic avenues" were the "primary means" of enforcement. *Id.* at 2680–2687.

Moreover, the Optional Protocol to the Vienna Convention creates a dispute resolution mechanism, and that mechanism may be initiated only by a State party to the Convention. The decision that results has "no binding force except between the parties and in respect to the particular case." Statute of the ICJ, art. 59, 59 Stat. 1062 (1945). The fact that the sole remedy created by the Convention's drafters is both limited to state parties and purely voluntary is not consistent with an argument that Article 36 of the Convention creates enforceable individual rights. *See Mora*, 524 F.3d at 197; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120–122 (2005).[4]

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[4] On March 7, 2005, the United States gave notice of its withdrawal from the Optional Protocol. *See Medellin v. Texas*, 128 S. Ct. [1346,] 1354 [(2008)].

3. The drafting history of Article 36 and the circumstances of its consideration by the President and the Senate also support the conclusion that it was not understood to create privately enforceable rights.

The initial proposed draft of what is now Article 36 was prepared by the International Law Commission (ILC), members of which recognized that the provision "related to the basic function of the consul to protect his nationals," and that "to regard the question as one involving primarily human rights" was to "confuse the real issue." Summary Records of 535th Mtg., U.N. Doc. A/CN.4/SR.535, at 48–49 (1960) (Sir Fitzmaurice); *see id.* (Mr. Erim) (article "dealt with the rights and duties of consuls and not with the protection of human rights"). Members of the ILC also observed that the proposed article would be subject to the "normal rule" that a country that did not comply with a provision of the Convention would "be estopped from invoking that provision against other participating countries." *Id.* at 49.

The final ILC draft submitted to the United Nations Conference required law enforcement officials to notify consular representatives whenever a foreign national was detained. *See* ILC, Draft Articles on Consular Relations, 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Numerous delegates expressed concern that mandatory notice would pose an enormous burden for countries with large tourist or immigrant populations, *see* 1 Official Records at 36–38, 82–83, 81–86, 336–340, and the Conference ultimately compromised by requiring notice to consular representatives only at the foreign detainee's request. *See id.* at 82 (explaining that change would "lessen the burden on the authorities of receiving States"). In this context, and given the stated purpose for its inclusion, Article 36 cannot reasonably be interpreted to create enforceable private rights.

The history of the Convention's consideration by the Senate and subsequent ratification and implementation by the Executive also support the conclusion that Article 36 was not understood to create individually enforceable rights within our domestic legal system. At the time of the Convention's ratification, the State Department and the Senate Committee on Foreign Relations agreed that the Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department explained that disputes under the Convention "would probably be resolved through diplomatic channels" or, failing resolution, through the process set forth in the Optional Protocol. *Id.* at 19. Consistent with this intent, the State Department's longstanding practice has been to respond to foreign States' complaints about violations of Article 36 by conducting an investigation and, where appropriate, making a formal apology and taking steps to prevent a recurrence.

4. Any ambiguity in the Convention's text or history should be construed in favor of the Executive Branch's construction, which is entitled to "great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989). The longstanding position of the Executive Branch is that the Vienna Convention's consular notification provisions are not enforceable in actions brought by private individuals or foreign governmental officials. The State Department's practices relating to the Convention also reflect the understanding that it does not create judicially enforceable individual rights.

Thus, the language, context, and history of the Convention do not support a construction that confers individual rights that could in turn be judicially enforced by private parties. Accordingly, the district court's dismissal of the Article 36 claims should be affirmed.

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**[B.]1. The Convention Does Not Create A Private Right Of Action For Money Damages.**

Nothing in the text or history of the Vienna Convention suggests that it was intended to create a private right of action for damages for violation of Article 36, and the fact that the drafters found it necessary to create an optional dispute resolution mechanism suggests strongly that no private remedy was envisioned. *Cf. Abrams*, 544 U.S. at 121–123. In 2007, the State Department surveyed U.S. embassies worldwide about other nations' practice in enforcing the Convention's consular notification requirements. Based on the responses to that survey, it appears that, with one possible exception, no country has allowed an individual claim for money damages for violation of consular notification requirements. *Mora*, 524 F.3d at 188 & n.5. In *Sanchez-Llamas*, the Supreme Court emphasized the unlikelihood that Convention signatories would have intended to require a remedy—there, application of the exclusionary rule in criminal proceedings—that was not recognized under those countries' domestic law. 548 U.S. at 343–44. There is no clear evidence that Article 36 was intended to create the highly unusual enforcement mechanism of a retrospective damages remedy and this Court should decline to hold that it did so *sub silentio*.

**2. Article 36 Is Not Enforceable Under 42 U.S.C. § 1983.**

Section 1983 does not create a money damages remedy against state officials for their failure to comply with Article 36. . . .

The Supreme Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases * * *." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Ibid.* Accordingly, in the context of a federal statute, only "an unambiguously conferred right [will] support a cause of action brought under § 1983." *Gonzaga Univ.*, 536 U.S. at 283; *see also id.* at 289 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."); *Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004) (rights creating language "must clearly impart an individual entitlement, and have an unmistakable focus on the benefitted class." (internal quotations marks and citations omitted)).

Even legislation that benefits an identified class may not be the basis for a § 1983 claim unless Congress intended to create individually enforceable federal rights. *See City of Rancho Palos Verdes,* 544 U.S. at 119–22 (§ 1983 "does not provide an avenue for relief every time a state actor violates a federal law"). This Court should be particularly reluctant to permit private enforcement under § 1983 of rights asserted under an international treaty, which is entered into by the Executive, with the Senate's advice and consent, against an understanding that "treaties, even those directly benefiting private persons, generally do not create private rights," Restatement (Third) of Foreign Relations Law, [§ 907, Comment a (1986)], and is also not the product of bicameral legislation. *Cf. Save Our Valley v. Sound Transit*, 335 F.3d 932, 937–938 (9th Cir. 2003) (private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress).

Furthermore, a court should be particularly inclined to hold that a § 1983 remedy is unavailable in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates "in the field that touche[s] international relations" than in an area of traditional police power). Here, the Senate gave its advice and consent to ratification of the Convention and the Optional Protocol, which set out a specific remedial scheme, to be invoked by one state party against another before an international tribunal. That arrangement weighs greatly

against recognition of an implicit personal right that may be enforced by a private person in the domestic courts of one of the parties.

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## B. CHILDREN

### 1. Adoption

#### *a. Cambodia*

On February 11, 2009, U.S. Citizenship and Immigration Services ("USCIS") clarified that it remained unable to approve petitions to adopt children from Cambodia. USCIS explained that the Department of State had determined that Cambodia was not currently meeting its obligations under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"); accordingly, USCIS would not approve petitions filed after the Hague Adoption Convention entered into force for the United States in 2008. USCIS also explained that it remained unable to approve adoption petitions filed before the United States became a party to the treaty. The USCIS statement, excerpted below, is available at *www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6dc85b6a466f110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD*.

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U.S. Citizenship and Immigration Services (USCIS) today clarified that it continues to be unable to approve any Form I-600, *Petition to Classify Orphan as an Immediate Relative*, filed for a child to be adopted from Cambodia. Also, the Department of State (DOS) has advised USCIS that DOS has determined that Cambodia is not currently meeting its obligations under *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Adoption Convention). . . .

Certification of compliance with the Hague Adoption Convention and the Intercountry Adoption Act of 2000 is required under the procedures for Hague Convention adoptee cases. . . .

The Hague Adoption Convention entered into force for the United States on April 1, 2008. The Hague Adoption Convention provides important safeguards to protect the welfare of children, birth parent(s) and adoptive parent(s) engaged in intercountry adoptions. Effective April 1, 2008, new intercountry adoptions between the United States and other Hague Convention countries must comply with the Hague Adoption Convention standards. Cambodia also ratified the Hague Adoption Convention in 2007. In the United States, Hague Convention adoptions are processed on USCIS Forms I-800A and I-800.

Before the United States and Cambodia ratified the Hague Adoption Convention, Cambodian intercountry adoption cases were processed on USCIS Forms I-600A, *Application for*

*Advance Processing of Orphan Petition,* and I-600, *Petition to Classify Orphan as an Immediate Relative*. However, the Immigration and Naturalization Service, USCIS' legacy agency, suspended U.S. orphan visa petition processing in Cambodia on Dec. 21, 2001 due to fraud, irregularities, and allegations of child-buying in the Cambodian adoption process. Because these concerns persist, DOS has determined it is not able to issue Hague Adoption Certificates or Hague Custody Declarations in Cambodia. It is important to note that this Cambodian suspension remains in effect for all Form I-600 (orphan) petitions filed before April 1, 2008.

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### *b. First Annual Report on Intercountry Adoption*

In September 2009 the Department of State submitted to Congress the FY 2008 Annual Report on Intercountry Adoption. As the introduction to the report explained:

> The Secretary of State is required by Section 104 of the Intercountry Adoption Act of 2000 (IAA) (Public Law 106-279), to submit an annual report to the U.S. Congress on intercountry adoption. This report provides the required information [fn. omitted] as well as additional information about the Department of State's (Department) activities to implement the Convention.
>
> The IAA mandates submission of the report by the Department "one year after the date of the entry into force of the Convention for the United States and each year thereafter." This is the first report submitted by the Department since the Convention entered into force for the United States on April 1, 2008.
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> **The report covers April 1, 2008 through September 30, 2008, i.e., the latter half of Fiscal Year (FY) 2008.** However, since the IAA mandated that the Convention could not enter into force for the United States until the Convention system was immediately implementable, the report describes activities that took place before April 1, 2008 to provide background and context. Also detailed are several initiatives that continued after the end of the reporting period. The statistics in the report represent only the final six months of FY 2008 in accordance with standard fiscal year reporting conventions. Subsequent reports will cover full fiscal years.

The full text of the report is available at *http://adoption.state.gov/pdf/Adoption%20Report_v9_SM.pdf*.

## 2. Abduction

### *a.* Ne exeat *clause*

On June 29, 2009, the Supreme Court granted a petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit. *Abbott v. Abbott*, 129 S. Ct. 2859 (2009). The question presented was "[w]hether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a 'right of custody' within the meaning of the Hague Convention on International Child Abduction" ("Hague Convention" or "Convention"), T.I.A.S. No. 11,670, 1343 U.N.T.S. 49. The case arose after a mother brought her son to the United States from Chile without the father's consent, as a Chilean *ne exeat* order required. The father brought suit in a federal court in Texas, asserting that the Hague Convention required the child's return to Chile.

At the request of the Supreme Court for its views, the United States filed a brief as *amicus curiae* in support of the petition for certiorari in May 2009 (available at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0645.pet.ami.inv.html*). The United States also filed an *amicus curiae* brief at the merits stage in September 2009 (available at *www.justice.gov/osg/briefs/2009/3mer/1ami/2008-0645.mer.ami.html*).

In its September 2009 brief as *amicus curiae*, the United States argued that the Court should reverse and remand the Fifth Circuit's decision because the "[p]etitioner's *ne exeat* right is a right of custody within the meaning of the Hague Convention," and therefore the "respondent's removal of [the child] was wrongful under the Convention." Excerpts follow from the U.S. brief, providing background on the Hague Convention and U.S. implementing legislation and discussing how the text, purposes, and negotiating history of the Hague Convention support the conclusion that custody rights under the Convention include a *ne exeat* right (some footnotes and citations to other submissions in the case omitted). The U.S. brief also discussed the significance of the treaty's post-ratification understanding with respect to a *ne exeat* right, explaining that

> [o]ther States parties to the Convention, whose interpretations of the Convention are "entitled to considerable weight," [citation omitted] have concluded, nearly unanimously, that a *ne exeat* right is a right of custody under the Convention. In addition, the multilateral Special Commission to Review the Operation of the Hague Convention (Special Commission), convened by the Permanent Bureau of the Hague Conference on Private International Law, has twice expressed the view—reflecting a consensus among attending States parties—that a *ne exeat* right is a right of custody.

As of the end of 2009, the case remained pending.[*]

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1. The Hague Convention was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49. To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and remedies to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. . . .

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if (1) it is "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id*. Art. 3(a), and (2) "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention," *id.* Art. 3(b). "[R]ights of custody," for purposes of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful—that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence . . . . Elisa Perez-Vera, *Explanatory Report,* in 3 *Actes et Documents de la Quatorzième Session (Child Abduction)* 426, paras. 16, 19, at 429–430 (Permanent Bureau trans. 1982) (*Explanatory Report*). Accordingly, a court considering a petition for the return of the child is not to adjudicate who should have custody or adjust the parties' respective custody rights, and any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16–17, 19.

The United States participated in the negotiations concerning the Convention's terms, see *Members of the First Commission*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents*, at 253–255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*. In order to implement the Convention,

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[*] Editor's note: On May 17, 2010, the Supreme Court held that a *ne exeat* right creates a right of custody. *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). *Digest 2010* will discuss relevant aspects of the decision.

[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention Art. 5(b). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id*. Art. 21.

Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq*., which establishes procedures for requesting return of a child abducted to the United States. In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles of the requested State," *id.* Art. 20—may be raised as affirmative defenses to the return of the child. 42 U.S.C. 11603(e)(2).

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## I. THE CONVENTION'S TEXT, PURPOSES AND NEGOTIATING HISTORY INDICATE THAT A *NE EXEAT* RIGHT SHOULD BE CHARACTERIZED AS A "RIGHT[] OF CUSTODY"

### A. The Convention's Definition Of Rights Of Custody Is Broad And Encompasses Joint And Single Rights

The text of the Convention provides that "the removal * * * of a child is to be considered wrongful where * * * it is in breach of rights of custody attributed to a person * * * either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7]

Consistent with that intent, Article 3(a) explicitly provides that the Convention recognizes "rights of custody" not only when they are vested in a single person holding sole custody, but also when they are held "jointly" with another person. Convention Art. 3(a). Because the Convention's drafters recognized that "courts are increasingly * * * in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents," the Convention is designed to protect all "types of joint custody" created by "internal law." *Explanatory Report* para. 71. Thus, removal of a child by a parent is "equally wrongful" when the parent shares custody, as when she has none at all, because "such action * * * disregard[s] the rights of the other parent which are also protected by law." *Ibid.*; see 51 Fed. Reg. at 10,506 (Department of State explanation that "[i]f one parent [with joint custody] interferes with the other's equal rights by unilaterally

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[7] Because the *Explanatory Report* is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See [*Air France v.*] *Saks*, 470 U.S. [392,] 400 [1985]; see also *Croll v. Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (Explanatory Report is "authoritative" interpretive guide), cert. denied, 534 U.S. 949 (2001).

removing * * * the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention").

In addition, the Convention contemplates that the "bundle" of custody rights with respect to a child can be divided among two or more people, such that "the violation of a *single* custody right suffices to make removal of a child wrongful." *Furnes v. Reeves*, 362 F.3d 702, 714–715 (11th Cir.), cert. denied, 543 U.S. 978 (2004); *id.* at 722 n.17. For instance, the Explanatory Report notes that a parent has "rights of custody" even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody." *Explanatory Report* para. 78. Thus, a parent who possesses only one or some custody rights within the bundle may seek a child's return. See *C. v. C.*, [1989] 1 W.L.R. 654, 662 (Neill, L.J.) (Eng. C.A.) (petitioning parent's possession of one right "included" in the definition of rights of custody is sufficient to make the return remedy available); see also *Whallon v. Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (parent who possessed parental decision making authority, but not physical custody, was entitled to return of child).

In sum, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Explanatory Report* para. 71; *id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12; *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) (recognizing "limited rights and joint rights"). As a result, the Convention's definition of custody rights is an "autonomous concept," which may be more expansive than a given participating country's domestic conception of custody. Hague Conference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, para. 9, at 222 (1990) (*Conclusions of the Special Commission of October 1989*); see *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) . . . ; *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes*, 362 F.3d at 711.

**B. Petitioner's *Ne Exeat* Right Is A Right Of Custody Under Articles 3(a) And 5(a) Of The Convention**

* * * *

The *ne exeat* right provides a joint right to "determine" residence within the meaning of Article 5(a) because a parent who holds a *ne exeat* right has the ability to decide whether the child may be taken outside of the country of habitual residence. See *Furnes*, 362 F.3d at 715. If the parent with physical custody wishes to leave the country, any "determin[ation]" as to the child's country of residence will be the result of a decision made jointly with the *ne exeat* holder.[8]

Decision-making authority with respect to the child's country of residence pertains to "the child's place of residence" within the meaning of Article 5(a). The phrase "place of residence"

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[8] Respondent argued in opposition to certiorari that the *ne exeat* right does not confer sufficient decision-making authority because a Chilean court may override an unreasonable exercise of the right. But the same can be said of *any* custody right, in that courts generally have the power, upon application, to override or modify a prior grant of custody rights. And regardless of the possibility of judicial override, the parent who wishes to relocate must petition the court for permission, rather than leaving unilaterally, thus giving the *ne exeat* holder a meaningful ability to participate in the decision whether any relocation should occur. See, *e.g.*, *C.*, 1 W.L.R. at 663 (Donaldson, M.R.) (*ne exeat* right is a "joint right subject always * * * to the overriding rights of the court," and is a right of custody).

encompasses both the country and the more particular locale in which the child lives. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 658. The Convention's essential focus is on the country as a place of residence: its entire purpose is to prevent the wrongful removal of children across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of " the child's home country. *Furnes*, 362 F.3d at 715. Even viewing a *ne exeat* right as an unadorned power to veto the other parent's decision to remove the child from the country, it affords the parent holding the right significant say over where the child will live—*i.e.*, inside the country or outside of it, with all the difference that entails. See *id.* at 714; *id.* at 716.

Moreover, inherent in the *ne exeat* right is the affirmative ability to take part in more specific decisions about the child's residence (as well as many other matters). In deciding whether to agree to relocation outside the country, a parent with a *ne exeat* right has the opportunity to impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 663 (Neill, L.J.) ("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence."); *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (parent holding *ne exeat* right may influence other parent's "selection of the destination country").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays—to the character of the schools that she attends and the opportunities that she will have as an adult. The *ne exeat* right thus confers on the parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (parent can thus "ensure that [the child] will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends[, and] * * * effectively can decide that [she] will *be Norwegian*."). Petitioner's *ne exeat* right is therefore a right of custody under the Convention.[9]

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3. Construing the *ne exeat* right as a "right[] of custody" also best effectuates the Convention's underlying purpose that decisions regarding custody rights "should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Explanatory Report* para. 19. A *ne exeat* order implicates this principle because, in addition to conferring decision-making authority on its holder, it gives the authorities of the country of habitual residence the opportunity to reconsider custody arrangements—for instance, by lifting or modifying the *ne exeat* order or, alternatively, by granting the *ne exeat* holder additional custody rights—if the parent with physical custody wants to leave the country but cannot obtain the agreement of the *ne exeat* holder. By violating a *ne exeat* order, the parent with physical custody not only disregards the other parent's custody rights, but also unilaterally and wrongfully circumvents

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[9] The Chilean Central Authority considers the ne exeat right conferred by Chilean law to merit the return remedy under the Convention. . . . Given the Convention's emphasis on promoting uniformity and deterring forum-shopping, 42 U.S.C. 11601(b)(3)(B), the Chilean Central Authority's view that respondent's removal of [the child] was wrongful under the Convention is entitled to weight.

the authorities of the country of habitual residence. In so doing, she obtains a new, and perhaps more favorable, forum in which to litigate where the child should live. Refusing to order the return of the child in this situation thus disregards the jurisdiction of the country of habitual residence, and permits the abducting parent to seek and potentially obtain greater custody rights than she was accorded in that country. That is precisely the result that the Convention aims to prevent. See *id.* para. 13; *id*. para. 15.

Respondent contends that the return remedy should not be triggered by a violation of a *ne exeat* right because the parent seeking return—the *ne exeat* holder—does not have physical custody rights. See *Croll*, 229 F.3d at 140 . . . . The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. See *In re D*, 1 A.C. at 634. The return remedy permits the courts of that country to determine whether the child's custody should be adjusted—including, on the petition of the parent with physical custody, whether the *ne exeat* order should be lifted.

That effectuates one of the purposes for which the *ne exeat* order was imposed in the first place—namely, permitting the home country's authorities to reconsider custodial arrangements if one parent wants to move to another country—as well as the Convention's goal of ensuring the continuing authority of the country of habitual residence. See *Explanatory Report* para. 19; *In re D*, 1 A.C. at 635. And the abducting parent is of course free to return with the child to the country of habitual residence. See *Furnes*, 362 F.3d at 717.

**C. The Negotiating History Indicates That The Convention's Drafters Understood A *Ne Exeat* Right To Be A Right Of Custody**

"In interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation." *Saks*, 470 U.S. at 400 (relying on delegates' discussions about treaty language); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 184187 (1993) (same). Accord Vienna Convention on the Law of Treaties, [*concluded on* May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331, 340], Art. 32. During the negotiations over the Hague Convention, several of the drafters indicated that they believed that a *ne exeat* right would fall within Article 5's definition of "rights of custody," and that violation of a *ne exeat* order would warrant the Convention's return remedy.

Although the primary abduction scenario envisioned by the Convention's drafters involved an individual without custody rights abducting a child away from her sole custodian, see Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, in 3 *Actes et Documents* 12, 1920, the drafters took care to define custody broadly so that the return remedy would apply beyond that situation. See, *e.g.*, *Procès-verbal No. 4*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 268, 271 (*Procès-verbal No. 4*) (statements of Israeli delegate and Chairman); *Procès-verbal No. 2*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 257, 260 (statement of Chairman that Article 3 should use a "formulation which would embrace as many persons and entities as possible"); *Explanatory Report* para. 71. Thus, the drafters agreed that Article 5 encompassed joint and divisible custody rights, even though the concept of shared or divided custody was relatively new in some States parties' domestic legal systems. *Procès-verbal No. 3*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 263, 264 (*Procès-verbal No. 3*); *id.* at 267; *Explanatory Report* para. 71.[10]

[10] Although the representative of the Commonwealth Secretariat (an intergovernmental association based in the United Kingdom), who was an observer in the negotiations, suggested that Article 5(a)

With respect to *ne exeat* rights specifically, the preliminary questionnaire submitted to the Hague Conference's member States for consideration posited that removing a child in violation of a *ne exeat* order would constitute wrongful removal. Adair Dyer, *Questionnaire on International Child Abduction by One Parent*, in 3 *Actes et Documents* 9, 9 explanatory note D (describing as abduction the removal of a child "by a parent from one country to another in violation of a court order which expressly prohibited such removal"). Prior to drafting the Convention, the Hague Conference's Special Commission on international child abduction met to discuss the questionnaire and other preliminary documents, and concluded that the Convention should be drafted to "cover *all* types" of abduction described in the questionnaire. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in 3 *Actes et Documents* 162, 162–163 (synthesizing the "discussions held by the Special Commission"); see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 18 (1999).

When the subject arose during negotiations, the Canadian delegate characterized the *ne exeat* right as a "right[] of access," and urged that violation of a *ne exeat* right should constitute a "wrongful removal" and therefore that Article 3 of the Convention should provide the return remedy for violations of access rights as well as custody rights. *Procès-verbal No. 3*, at 266. The delegate from the Netherlands responded that "under the present terms of the Convention," which included a substantially similar version of Articles 3 and 5(a), "the abducted child would have to be sent back immediately"—thus indicating that he understood the *ne exeat* right to be a "right[] of custody" that would trigger the return remedy. *Ibid.* No other delegate disagreed, and the representative of the Commonwealth Secretariat concurred that "article 5 * * * could cover cases where the non-custodial parent had a right to be consulted."[12] *Ibid*. The Canadian proposal to expand Article 3 to make the return remedy available for access rights was defeated, *id.* at 267, suggesting that the delegates understood the existing language of custody rights in Articles 3 and 5(a) to encompass the rights arising from *ne exeat* orders.

**D. The Executive Branch Interprets The Convention To Provide The Return Remedy For *Ne Exeat* Violations**

Consistent with this history, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the

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should be "clarif[ied]" to make explicit its inclusion of "separable" custody rights—for instance, when the right to determine the child's residence and the right to care for the child were vested in different people, *Procès-verbal No. 4*, at 271—the drafting committee ultimately decided not to make any revisions. In reporting that decision, Adair Dyer, First Secretary at the Permanent Bureau, stated that "the existing definition of custody rights embraced the situation where rights of [physical] custody and the right to determine a child's place of residence were vested in different persons." *Procès-verbal No. 14*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 342, 344. No delegate objected to this characterization.

[12] The chair of the negotiations, A.E. Anton, later wrote that it was "less clear" whether a *ne exeat* order should be viewed as a right of custody under Article 5(a)'s definition, and that "[a] suggestion that the definition of 'abduction' be widened to cover this case was not pursued." A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 546 (1981). Anton stressed, however, that his statements reflected his views alone, not those of the drafters. *Id.* at 537 n.*. The negotiating history strongly indicates that the drafters believed that the existing language of Articles 3 and 5(a) was broad enough to encompass the *ne exeat* right.

Convention as including *ne exeat* rights among the protected "rights of custody."[13] The Executive Branch's interpretation of a treaty "is entitled to great weight." *Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)); see *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). The Executive Branch's interpretation should not be rejected here, particularly because it is consistent with the interpretation by the great majority of parties that have addressed the issue. As this Court observed in *Sumitomo*, where the States parties are in agreement, the Court's role—absent extraordinary circumstances not present here—is to "giv[e] effect to the intent of the Treaty parties." 457 U.S. at 185.

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### *b. 2009 Hague Abduction Convention Compliance Report*

In April 2009 the Department of State forwarded to Congress the 2009 Report on Compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The report, as required by § 2803 of Public Law 105-277, as amended, 42 U.S.C. § 11611, evaluated each of the countries with which the United States has a treaty relationship for effectiveness in implementing the Hague Abduction Convention with respect to applications for return of or access to children on behalf of parents in the United States. The 2009 report, covering the period October 1, 2007 through September 30, 2008, identified Honduras as "not compliant" with the Hague Abduction Convention and cited "patterns of noncompliance" in Brazil, Chile, Greece, Mexico, Slovakia, Switzerland, and Venezuela.

Excerpts below from the report explain the standards the State Department uses for analyzing states' compliance with the Hague Abduction Convention. The report is available at *http://travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf.*

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Convention partner countries are evaluated for compliance in three areas: Central Authority performance, judicial performance, and law enforcement performance. . . .

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The report breaks down such countries into two categories, "Countries Not Compliant with the Convention," and "Countries Demonstrating Patterns of Noncompliance with the Convention."

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[13] Prior to the United States' filing, upon the Court's invitation, of a brief amicus curiae supporting certiorari in this case, the State Department had not formally memorialized its interpretation, although that filing in itself represents the Department's "considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). But the State Department has informed this Office that the position set forth in that brief and this one has long been its view.

These categories derive from the language of 42 U.S.C. § 22611(a)(1) and (2).

The Department bases its analysis of country compliance with the Convention largely on the standards and practices outlined in the *Guide to Good Practice* of the Permanent Bureau of the Hague Conference on Private International Law (referred to in this report as the "Hague Permanent Bureau"). Using the Guide, the Department analyzed the following three compliance areas to reach its findings for this report:

1) Central Authority performance;
2) Judicial performance; and
3) Law Enforcement performance.

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NOT COMPLIANT

The designation of "Countries Not Compliant with the Convention" encapsulates the requirement in 42 U.S.C. § 11611(a)(2). Countries which the Department considers to be failing in all three performance areas for the reporting period are listed as "Not Compliant."

PATTERNS OF NONCOMPLIANCE

The designation of "Countries Demonstrating Patterns of Noncompliance" derives from 42 U.S.C. § 11611(a)(3). The Department considers countries in this category to be those that demonstrate a failure to comply with the Convention in one or two of the three performance areas.

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## Cross References

*Alien Tort Statute litigation*, **Chapter 5.D.2.**
*Comity issues in litigation under the Hague Abduction Convention*, **Chapter 15.C.2.b.**